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No. 87-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Appellant,

v.

IRWIN HALPER,

Appellee.

On Appeal From The United States District Court For The Southern District Of New York

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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Amicus Curiae, invited by the Court per Order of October 17, 1988
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QUESTION PRESENTED

The defendant was fined $5,000 and sentenced to two years in prison for $585 in false claims. The question is whether the imposition in a second proceeding of a $130,000 penalty for the same $585 in false claims constitutes a second punishment for the same offense in violation of the double jeopardy clause, or is rather simply compensation for the government's loss and thus a proper civil remedy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

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STATEMENT OF THE CASE

On April 26, 1985, appellee Irwin Halper was indicted in the United States District Court for the Southern District of New York for filing false Medicare claims, in violation of the False Claims Act, 18 U.S.C. § 287. J.A. 7-17. The indictment charged, and the government proved, that Halper had filed 65 false claims over a two-year period seeking reimbursement from the government of $10 or $12 per claim, when the proper amount was $3. The total amount by which Halper's claims were inflated over the two-year period was, as the District Court found, "[a]t most" $585. J.S. App. 10a. On July 9, 1985, Halper was convicted and sentenced to pay a "[t]otal fine" of $5,000 and to serve two years in prison. J.A. 19. Halper

paid his fine and duly reported to prison to serve his sentence.

Less than a year later, on April 11, 1986, the government returned to the District Court for the Southern District, with a new complaint against Halper seeking "damages and penalties" under the False Claims Act, 31 U.S.C. §§ 3729-3731. J.A. 21. This complaint was expressly based on the same 65 false claims that had been the basis of the prior indictment and conviction, *compare* J.A. 14-17 *with* J.A. 28-31, and sought double damages "in an amount to be determined at trial," J.A. 25, "plus $130,000 in forfeitures, together with interest, costs and attorneys' fees."[1] The government promptly moved for summary judgment on the basis of the preclusive effect of the prior criminal conviction, noting that "[t]he false claims that are the subject of the instant action are the same false claims for which defendant was convicted" and

[1] J.A. 26. The False Claims Act provided, at the time suit was brought, that a person violating the Act is liable "for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action." 31 U.S.C. § 3729 (1982). The government treated each false claim as a separate count, resulting in the $130,000 penalty. The Act was amended in 1986 to increase the penalty to "not less than $5,000 and not more than $10,000," plus triple damages and costs. 31 U.S.C. § 3729 (Supp. IV 1986). The government maintains that it could have prosecuted Halper under the amended Act, *see* Gov't Br. at 4 n.3, which would have yielded a penalty of from $325,000 to $650,000 for the $585 in false claims. The 1986 amendments also increased the maximum criminal fine from $10,000 to $250,000 for individuals and $500,000 for organizations. *See* 18 U.S.C. §§ 287, 3571 (Supp. IV 1986). If the false claim relates to a contract with the Department of Defense, the maximum fine is $1 million. *See* 18 U.S.C. § 287 note (Supp. IV 1986) (Increased Penalties for False Claims in Defense Procurement).

that "[d]efendant already has been convicted of * * * submitting false claims based on the same acts alleged in the Complaint."[2]

The District Court agreed, concluding that "[b]ecause Halper is collaterally estopped from denying the facts which entitle the Government to judgment in its favor, the motion for summary judgment is granted." J.S. App. 6a. The court, however, declined to award the government the $130,000 penalty it sought, on the ground that imposing such a penalty on Halper would be punishing him twice for the same offense in violation of the double jeopardy clause. The court noted that this Court had held that the False Claims Act's provision for double damages plus a $2,000 penalty was "not in itself a criminal penalty giving rise to a claim of double jeopardy," because its purpose was "to ensure that the Government is fully compensated for any damages it has incurred." J.S. App. 9a (citing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943)). Given this rationale in *Hess*, however, the District Court concluded that "a civil penalty designed to make the Government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the Government," with due regard for "the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages." J.S. App. 10a.

The District Court noted that the government's actual damages were "[a]t most" $585, and that "[e]ven adding to that amount the Government's expense in investigating and prosecuting this action, the total amount necessary to

[2] R. 21: Plaintiff's Statement Pursuant to Local Rule 3(g), at ¶2; R. 20: Declaration in Support of Plaintiff's Motion for Summary Judgment, at ¶3.

make the Government whole bears no rational relation to the $130,000 penalty the Government seeks." J.S. App. 10a. The court then made the factual finding—never challenged by the government—that a recovery of $16,000 "will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action." J.S. App. 10a. The court acknowledged that this figure was "an approximation," but also noted that the government—which, as plaintiff, bore the burdens of production and proof—"submitted no evidence of its expenses in this action."[3]

Dissatisfied with the $16,000 penalty on top of the $5,000 fine and two years in prison for Halper's $585 in false claims, the government moved for an amendment of the judgment under Fed. R. Civ. P. 59(e). The government did not dispute the calculation of $585 in actual damages, nor did the government challenge the court's factual finding that $16,000 would compensate the government for its damages *and* "expenses incurred in investigating and prosecuting" the action. J.S. App. 10a. Nor did the government seek to adduce additional evidence of its expenses in response to the court's comment that it had failed to do so. *See* J.S. App. 11a. Instead, the government argued that the court had no discretion in assessing penalties under the False Claims Act, and—in the absence of government consent to a lesser amount—must impose the $2,000 penalty on each count, for a total penalty of $130,000.

On reconsideration, the District Court agreed that the $130,000 penalty was mandatory under the Act, but concluded—consistent with the analysis in its earlier opinion—that imposition of such a penalty in the circumstances of this case would violate the double jeopardy clause. The court noted that "[t]he protection against multiple punishments is implicated here," because Halper had already been punished as a result of the criminal prosecution for the same acts. J.S. App. 2a. The District Court stated that this Court in *Hess* had concluded that the civil penalty provisions were intended to be remedial, but the District Court also noted that "the *Hess* Court did not stop with an analysis of Congress' intent" but went on and "examined the effect of the penalty" which, in *Hess*, "was approximately equal to the actual loss sustained by the government." J.S. App. 3a-4a. Here, in contrast, the $130,000 penalty was "220 times the actual and easily measurable loss" sustained by the government, and thus "amounts to a criminal penalty for violations for which Halper has already been punished." J.S. App. 5a. The court therefore declined to impose the $130,000 penalty. Because the government had convinced it that it had no discretion to impose a lesser penalty in the absence of government consent, the court vacated the earlier judgment awarding a $16,000 penalty, and instead awarded the government double damages under the Act together with the costs of the action. J.S. App. 5a, 15a. This appeal followed.[4]

[3] J.S. App. 11a. The court also noted that it had not even taken into account "the $5,000 criminal fine already imposed on Halper for deterrence and as a penalty." J.S. App. 10a.

SUMMARY OF ARGUMENT

After his criminal conviction for filing false claims, Mr. Halper was punished with two years in prison and a

[4] The appellee, who proceeded *pro se* below, did not file a brief on the merits in opposition to the government's brief. This amicus brief is submitted in support of the judgment below at the invitation of the Court by Order of October 17, 1988.

$5,000 fine. He could not be punished a second time in a separate proceeding for that same offense, consistent with the double jeopardy clause. On this there is no dispute. Yet that is precisely what the government attempted to do below. It sought to impose upon Halper a $130,000 penalty for the same $585 in false claims that led to his prior criminal conviction and punishment. The District Court correctly concluded that such a recovery would, on the facts of this case, clearly constitute punishment, and was therefore barred by the double jeopardy clause.

Under this Court's decision in *Hess*, the government was free to bring a second, civil proceeding to recoup its losses from Halper, regardless of any prior criminal prosecution. Such a proceeding does not violate double jeopardy because it is brought not to punish Halper but to recompense the government, a permitted civil objective. But this rationale carries with it an inherent limitation: if the government seeks in the second proceeding to impose penalties in an amount beyond any reasonable compensation for its losses, the result is not permitted recompense but forbidden punishment. In *Hess*, the government's recovery was approximately equal to its actual damages. *See* 317 U.S. at 540, 545. Here, the recovery sought cannot be deemed compensatory because, as the District Court found, a "penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss." J.S. App. 5a.

Even if the government's loss is more broadly conceived as embracing the costs of investigating and prosecuting Halper's false claims, the court below found as fact—and the government never disputed—that $16,000 would reasonably compensate the government for all its losses, specifically including the costs of investigation and pros-

ecution. J.S. App. 10a. The recovery sought by the government was thus more than eight times any reasonable notion of its total loss, and cannot be viewed simply as recompense for that loss. This Court has recognized that the question in *Hess*—whether the second recovery recompenses the government for loss or punishes the defendant a second time for the same offense—depends "[o]n th[e] record" of each particular case. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 154 (1956). On this record, it is clear that the District Court was correct in finding that the $130,000 penalty constituted punishment.

The government arrives at the wrong answer because it asks the wrong question. The government frames the issue as whether the second proceeding should be regarded as civil or criminal in nature. Such an inquiry might be pertinent if the question at issue concerned the multiple *prosecution* aspect of double jeopardy. In such a case it would be important to know whether the second proceeding was properly characterized as necessarily criminal in nature, so that it could not be brought at all after the prior criminal prosecution. That is not the issue here. The District Court did not rule that the second proceeding could not be brought at all, but rather that the recovery in that proceeding could not so far exceed the government's losses as to impose further punishment. This case implicates the multiple *punishment* aspect of double jeopardy protection. In such a case the overall nature of the second proceeding is not determinative; the question—which depends on the particular facts—is whether punishment has been imposed, regardless of "'the mode in which it is inflicted, whether by a civil action or a criminal prosecution.'" *United States* v. *La Franca*, 282 U.S. 568, 573 (1931) (quoting *United States* v. *Chouteau*, 102 U.S. 603, 611 (1880)).

The government also errs in forecasting dire consequences with respect to its efforts to stamp out false claims if the decision below is upheld. The ruling below permits the government to obtain the maximum in criminal sanctions and fines—recently raised to $250,000 on each count for individuals—and then bring a second action, in which the defendant is collaterally estopped, to recoup *all* of its losses, including expenses of investigation and prosecution. There is nothing extraordinary in the government accepting less than the full statutory penalty in the second proceeding, should that be necessary. Indeed, such an approach was at one time Department of Justice policy. *See United States* v. *Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965). In addition, should the government want to impose the full extent of the criminal and civil sanctions, nothing in the decision below precludes it from seeking both in a single proceeding. In such a case there would be no multiple prosecution issue, and the only multiple punishment question would be whether the penalties were within the limits set by Congress. This Court has never held, however, that multiple punishments may be imposed in separate proceedings for the same offense. That is the result the government seeks, and it should be rejected by this Court.

ARGUMENT

A. This Court's Decisions Dictate The Factual Inquiry Undertaken By The Court Below Into Whether The Penalty Recompensed The Government For Its Losses Or Punished The Defendant

More than a century ago, this Court unanimously recognized that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). The double

jeopardy clause prohibits the imposition of a second punishment in a second proceeding for the same offense. *See id.* ("there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense"); *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) (clause protects against "being subjected to double punishments"); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (clause "protects against multiple punishments for the same offense"). Indeed, protection against multiple punishment for a single offense was the primary historical purpose underlying the clause.[5]

There is no dispute in this case that the government brought a second proceeding against Halper to impose the penalty of $130,000. The government suggests that it could have sought the penalty in the same proceeding as the criminal prosecution, *see* Gov't Br. at 28 & n.18, but it did not do so, and the difference between one or two proceedings is of course critical for double jeopardy pur-

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[5] The first forerunner of the clause to appear in the American Colonies was paragraph 42 of the Massachusetts "Body of Liberties," adopted by the General Court in 1641: "No man shall be twice sentenced by Civil Justice for one and the same Crime, offense, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). James Madison's first draft of what became the double jeopardy clause specified that "[n]o person shall be subject, except in cases of impeachment, to *more than one punishment* or one trial for the same offense." 1 Annals of Cong. 451-452 (1789-1791) (J. Gales ed. 1834) (emphasis supplied). The change to the more arcane language of the clause as adopted was not intended to alter Madison's meaning. *See* J. Sigler, *Double Jeopardy*, at 28-33 (1969); Note, *Twice in Jeopardy*, 75 Yale L. J. 262, 266 n.13 (1965); Thomas, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 3 & n.3 (1985).

poses. Nor is there any dispute that Halper was punished as a result of the first proceeding, receiving a fine of $5,000 and two years in prison. Finally, there is no dispute that the two proceedings were based on the same offense. Indeed, the government itself emphasized that the "false claims that are the subject of the instant action are the same false claims for which defendant was convicted," successfully invoking collateral estoppel in the second proceeding.[6] The issue, then, is simply whether imposing a penalty of $130,000 on Halper for $585 in false claims is punishing him for those false claims.

The proper approach to considering this question was outlined in this Court's unanimous decision in *United States* v. *La Franca*, 282 U.S. 568 (1931)—a case the government ignores. In that case, as here, the defendant was convicted and fined in a criminal prosecution, and the government thereafter brought a civil action for double taxes and penalties based on the same unlawful acts that formed the basis of the criminal conviction. *Id.* at 569-570. As the Court framed the issue:

> Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule? [*Id.* at 573.]

The Court answered no, concluding that the label affixed to the second proceeding was not controlling. To avoid the "grave constitutional question" that would arise if the defendant were punished a second time, the Court

[6] *See supra* note 2.

construed a statutory provision barring further "prosecution" of those convicted under the criminal statute as precluding the civil action. *Id.* at 572, 575. "[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." *Id.* at 575.

This conclusion did not mean, as the government assumes it must, *see* Gov't Br. at 28, that the penalties could not have been collected in a civil proceeding. It simply meant that when a defendant had already been punished in a criminal prosecution for his acts, he could not be punished again—whether in a criminal or civil proceeding—for those same acts:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." [282 U.S. at 573 (quoting *United States* v. *Chouteau*, 102 U.S. at 611).]

It is important to recognize that *Helvering* v. *Mitchell*, 303 U.S. 391 (1938)—decided seven years after *La Franca*—considered a significantly different question. In *La Franca*, as here, the defendant had been previously convicted and punished, so the "grave constitutional question" was whether the second proceeding imposed additional punishment in violation of the double jeopardy clause.[7] In *Helvering*, the defendant had been *acquitted*

[7] 282 U.S. at 575. Indeed, the statutory provision on which the Court based its holding to avoid a constitutional ruling only applied if the defendant had been previously *convicted*. *Id.* at 571.

in the prior criminal proceeding, and thus had not been punished at all. The double jeopardy question in *Helvering* was not one of multiple punishment—there would be only one punishment—but rather whether the second proceeding was somehow inherently criminal so that the defendant could not be made to stand trial twice for the same crime.

As Justice Stewart noted for the Court in *North Carolina* v. *Pearce*, 395 U.S. at 717, the guarantee against double jeopardy consists of "three separate constitutional protections."

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. [*Id.* (footnotes omitted).]

When the first two protections are at issue, it is important to know whether the second proceeding is criminal in nature. When the third protection is at issue—as here—such a general characterization is beside the point, and the only question is whether the particular defendant, on the particular facts, is being punished a second time.

The *Helvering* Court concluded that the civil proceeding before it was "remedial in its nature," and thus not barred by the prior acquittal. 303 U.S. at 397. The Court recognized that "[w]here the *objective* of the subsequent action *** is punishment, the acquittal is a bar," but concluded that "[u]nless this sanction [a fifty percent penalty] was *intended* as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable." *Id.* at 398-399 (emphasis supplied). The focus was on the "nature" of the proceeding and the "objective" of Congress rather than the impact on the defendant,

because there was no question of multiple punishment but only of being twice in jeopardy. If the "nature" of the proceeding was not "essentially criminal" the defendant was not put twice in jeopardy, but, as *La Franca* had shown, whether the second proceeding was civil or criminal was not similarly determinative when the issue was multiple punishment.

Justice Brandeis chose his words with care in *Helvering*, and they must be read in the same manner: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." 303 U.S. at 399. The second aspect—"attempting a second time to punish *criminally*"—was at issue in *Helvering* and required analysis of the intent of Congress and the overall nature of the second proceeding. The italicized adverb is not found in Justice Brandeis' articulation of the first aspect—"punishing twice"—because, as *La Franca* demonstrated, it mattered not whether the second punishment was imposed in a civil or criminal proceeding. The question there was not whether the proceeding was intended to be civil or criminal, but simply whether the defendant was being punished a second time.

The government's analysis in this case is misdirected because it fails to grasp this critical difference between the *La Franca* fact pattern and that of *Helvering*. The government frames the issue as whether an action seeking penalties under the False Claims Act is by its nature a criminal proceeding, focusing on congressional intent and applying the analysis in cases such as *United States* v. *Ward*, 448 U.S. 242 (1980), and *Flemming* v. *Nestor*, 363 U.S. 603 (1960)—which did not involve double jeopardy at

all—and cases such as *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232 (1972), and *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)—which involved prior acquittals and thus did not implicate the multiple punishment aspect of double jeopardy. In such cases the appropriate focus may well be whether Congress intended a civil or criminal sanction, *see Ward*, 448 U.S. at 248, and it may well be appropriate to insist upon "the clearest proof" before finding that what Congress intended as a civil sanction is unconstitutional because it is actually criminal. *Id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. at 617).

But that is not this case. The court below did not decide that the civil False Claims Act is unconstitutional on its face because it necessarily imposes a criminal sanction. Nor did the court below rule that Halper could not be subjected to a civil proceeding under the False Claims Act because such a proceeding is "essentially criminal" and thus would subject him to double jeopardy. The ruling below was much narrower than the straw man the government attacks. The District Court held only that imposing a $130,000 penalty on Halper for $585 in false claims was punishment and, since Halper had already been punished, would violate the double jeopardy clause. The court did not hold the second proceeding invalid; indeed, the court permitted the government to recover double damages and costs in the civil proceeding. J.S. App. 5a. The court simply limited the government's recovery to avoid the clearly punitive aspect of the relief sought.[8]

[8] It is true that "the risk to which the Clause refers is not present in proceedings that are not 'essentially criminal.'" *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). But this case is not about "risk"—the multiple prosecution aspect of double jeopardy—but instead about actual *results*—the multiple punishment aspect. It is not the "essential" nature of the proceeding that is at issue, but the actual effect of the sanctions in this particular case.

This Court's opinion in *Hess*, *supra*, can only be understood against this background. It addressed both the question at issue in *Helvering* and that at issue in *La Franca*, and it is important that the answers to the separate questions not be confused. *Hess* involved a *qui tam* action under the False Claims Act brought by an individual against electrical contractors who had engaged in collusive bidding on government contracts.[9] The contractors previously had pled *nolo contendere* to criminal charges under a different statute and been fined.[10] The

[9] The False Claims Act permits *qui tam* actions and, at the time *Hess* was decided, awarded the individual bringing the suit one-half of any recovery, with the other half going to the government. *See Hess*, 317 U.S. at 540.

[10] The government, in its brief, misstates the facts of *Hess* with respect to a rather significant point. The government states that the defendants in *Hess* "were convicted under the criminal false claims statute" prior to the proceeding under the civil false claims statute. Gov't Br. at 11. In fact, the criminal conviction was not under the false claims statute at all, but under a different provision, "a general statute dealing with conspiracy to defraud the government, 18 U.S.C. § 88." *Hess*, 317 U.S. at 548. At the time, the criminal false claims statute was codified at 18 U.S.C. § 80 (1940). Indeed, the District Court in *Hess* rejected the double jeopardy claim on the ground that the criminal and civil proceedings charged different offenses:

> It will be noted that this indictment made no reference to the presentation of a false claim against the Government for payment or approval, such as would be required in charging an offense under Section 5438, Revised Statutes. We cannot find that the offense charged in the indictment is the same as charged in the instant case; therefore, there is no double jeopardy here. [41 F. Supp. 197, 210 (W.D. Pa. 1941).]

In its brief before this Court in *Hess*, the government agreed with this reasoning. *See* Brief for the United States as Amicus Curiae, at 50-53. The government also noted that *Hess* was brought by a private plaintiff, so it was unclear whether the double jeopardy clause—a limitation on government action—applied at all. The government at the time did not bring successive criminal and forfeiture proceedings

amount of the false claim was $101,500, and the government's total recovery as a result of the *qui tam* action was $150,000. *See* 317 U.S. at 540, 545. The government thus received 148 percent of its actual damages in *Hess*, compared to the more than 22,000 percent figure in this case.

The contractors in *Hess* argued "that the present action should be barred," *id.* at 548—the same claim as in *Helvering*—and the Court quite naturally turned to the analysis in that case to dispose of it. As in *Helvering*, the *Hess* Court concluded that the proceeding before it was not inherently criminal but was remedial, intended not "to authorize criminal punishment to vindicate public justice" but rather to "afford the government complete indemnity for the injuries done it." 317 U.S. at 548-549. This was enough to dispose of the contention that the civil proceeding could not be brought at all.

Because the defendants in *Hess* had been previously convicted and punished, however, there was more to the case than whether it could be brought at all, and "the *Hess* Court did not stop with an analysis of Congress' intent." J.S. App. 4a. The Court went on to consider the sanction actually imposed, stating that the proceeding "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." 317 U.S. at 550. As noted, the government in *Hess* recovered a total of $150,000 for a $101,500 loss. The double damages provision was unobjectionable on the particular facts before the Court, "since in the nature of the *qui tam* action the government's half of the double

under the False Claims Act. *See* Brief at 46-47, 59-60. Here, in contrast, there is no dispute that the criminal and civil proceedings were both under the False Claims Act, and no dispute that both proceedings were brought by the government.

damages is the amount of the actual damages proved." *Id.* The Court also noted that private plaintiffs are often allowed to recover two, three, or four times actual damages, and "[t]he law can provide the same measure of damage for the government as it can for an individual."[11] With respect to the forfeiture provision, the Court noted that it served "to make sure that the government would be made completely whole." 317 U.S. at 551-552. Since there were 56 counts at issue in *Hess*, the total forfeiture was $112,000, "approximately equal to the actual loss sustained by the government." J.S. App. 4a.

Justice Frankfurter's separate concurrence confirmed the foregoing reading of the majority opinion. He objected to the majority's reasoning on the ground that the protections of the double jeopardy clause should not hinge on a court's determination of whether the sanctions constitute "an extra penalty, or merely an indemnity for loss suffered." 317 U.S. at 554.

> If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution *** ought to be allowed to prove that, *as a matter of fact*, the forfeiture and double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss. [*Id.* (emphasis supplied).]

[11] *Id.* at 550-551. The government's recovery in this case was not two, three, or four times actual damages, but *220 times* actual damages. Such a recovery has no recognized counterpart for private plaintiffs. *See also Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, No. 88-556 (*cert. granted* Dec. 5, 1988), in which the Court granted certiorari to consider whether a punitive damages award in a civil case of 117 times actual damages violates the Eighth Amendment.

That is, of course, precisely what happened in this case. The District Court found as a fact that the government's loss—broadly conceived—included no more than $16,000 in actual damages and "expenses incurred in investigating and prosecuting this action." J.S. App. 10a. A penalty of $130,000 "exceed[s] any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss," and therefore—under the majority's analysis—must be regarded as punitive and not remedial.

The *Hess* majority in no way disputed Justice Frankfurter's logical conclusion from its analysis. Justice Frankfurter's point did not affect the result in *Hess* because the contractors in that case could *not* show, on the facts, that the $150,000 the government received for actual damages of $101,500 exceeded all of the government's losses, including costs of investigation and prosecution.[12]

[12] The government recognizes that "the Court's analysis [in *Hess*] invoked rough notions of proportionality," but goes on to argue that the Court "did not leave open the possibility of proving disproportionality in any particular case." Gov't Br. at 14-15 n.11. As noted, the Court not only left open the possibility—as Justice Frankfurter emphasized—but also carefully considered the relationship between the government's recovery and its loss on the facts before it. *See, e.g.*, 317 U.S. at 550 (with respect to double damages, "it cannot be said that there is any recovery in excess of actual loss for the government," in light of the *qui tam* provision).

Justice Frankfurter's alternative analysis, which would avoid what he saw as the flaw in the majority's analysis of permitting a factual showing that the government's recovery exceeded a remedial amount, was based on the view that where "two * * * proceedings merely carry out the remedies which Congress has prescribed in advance fora wong, they do not twice put a man in jeopardy for the same offense." *Id.* at 555. No other member of the *Hess* Court joined this position—which would permit multiple punishments *in multiple proceedings* for the same offense—and it has never been accepted by the Court.

Thus, contrary to the government's contention, Gov't Br. at 9, the ruling below is in no way "at odds" with *Hess*, but is in fact securely grounded in the rationale of that decision. The same is true with regard to the other case on which the government principally relies, *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). In that case the defendant purchased five surplus motor vehicles from the government, using the names of veterans entitled to priority in such purchases. The company pled *nolo* to criminal charges and paid a fine. The government then brought a civil action under a statute providing three alternative remedies: (1) $2,000 plus double damages, (2) twice the consideration agreed upon "as liquidated damages," or (3) recovery of the property and retention of the consideration "as liquidated damages." *Id.* at 149 n.1, 151. The government alleged no specific damages, but sought recovery of $2,000 for each vehicle under alternative one.

This Court upheld the recovery, construing alternative one *in pari materia* with two and three, and concluding that the recovery sought by the government "is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Id.* at 153. As the Court reasoned, "[t]he damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-154. The Court recognized that liquidated damages provisions, "when reasonable," were not to be regarded as penalties but as "civil in nature," and concluded on the

facts that the recovery was not "so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 151, 154.

The same analysis leads to the opposite conclusion on the facts of this case. Here the loss to the government was found by the District Court to be $585 in actual damages. J.S. App. 10a. The law is clear that "liquidated damages" of $130,000 for an actual loss of $585 are not "reasonable" but rather "so unreasonable or excessive" as to constitute "a criminal penalty." 350 U.S. at 151, 154.[13]

Nor is the analysis any different when the damages sustained by the government are more broadly conceived, to include the costs of investigation and prosecution as well as actual damages. The courts have focused on this element of loss in applying *Rex Trailer*, viewing the statutory penalty as compensation for the costs of uncovering and prosecuting false claims, even if no actual damage can be shown.[14] Here, however, the District Court found as fact that $16,000 would "reasonably compensate" the government not only for its actual damages but for "expenses

[13] *See, e.g., Lake River Corp.* v. *Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) ("When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, * * * and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as a penalty is unmistakable"); *United States* v. *Commercial Constr. Corp.*, 741 F.2d 326, 328 (11th Cir. 1984) (liquidated damages clause is a penalty and not enforceable when "the liquidated amount is out of all proportion to the damages actually suffered"); *Leasing Service Corp.* v. *Justice*, 673 F.2d 70, 73 (2d Cir. 1982) (clauses "providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable").

[14] *See, e.g., Toepleman* v. *United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

incurred in investigating and prosecuting this action" as well. J.S. App. 10a. In reaching this finding, the court specifically recognized that it "must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages." J.S. App. 10a. Even with that caveat, the court concluded—and the government never disputed—that $16,000 would ensure that "the government would be made completely whole." *Hess*, 317 U.S. at 552. Given that finding, "liquidated damages" of $130,000 under the rationale of *Rex Trailer* are not recoverable for an actual loss of no more than $16,000.

The *Rex Trailer* Court expressly recognized the limited nature of its holding, concluding that *"[o]n this record* it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." 350 U.S. at 154 (emphasis supplied). The Court itself thus recognized that the conclusion might be different when—as here—the record demonstrated that the government's recovery vastly exceeded any remedial amount. The government never disputed the District Court's factual finding that its total losses did not exceed $16,000, and never submitted any evidence of greater losses. *See* J.S. App. 11a. On this record, it cannot claim that the $130,000 penalty it seeks will serve a remedial purpose.[15]

[15] As the District Court correctly noted, "[t]he government cites no cases involving sums that even begin to approach the tremendous disparity between actual damage and the 'civil penalty' in this case." J.S. App. 4a. The government states that the courts in *United States* v. *Killough*, 848 F.2d 1523 (11th Cir. 1988), and *Scott* v. *Bowen*, 845 F.2d 856 (9th Cir. 1988) (per curiam), have concluded that the decision

B. The Approach Urged By The Government—Eschewing Any Factual Inquiry—Is Inconsistent With Double Jeopardy Protection

The government criticizes the court below for examining the particular facts before it and considering whether the $130,000 penalty for $585 in false claims would "do more than afford the government complete indemnity for the injuries done it." *Hess*, 317 U.S. at 549. According to the government, the proper approach is to look not to the particular facts but rather to the overall purpose of Congress in providing for civil sanctions. If that purpose is found to be remedial, the government argues, then any consideration of the disproportionality of the amount of the penalty to the government's loss is irrelevant.

As noted, this approach confuses the multiple prosecution aspect of double jeopardy protection with the multiple punishment aspect. Congress' overall purpose may be pertinent in deciding if the proceeding is inherently a

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below is "incorrect" and have declined to follow it. Gov't Br. at 10. The court in *Killough* did no such thing. It recognized the holding below that in this "particular case" the "disproportionate award would violate the Double Jeopardy Clause prohibition against multiple punishments * * *." 848 F.2d at 1534. The court then examined the particular facts of the case before it, and concluded that $104,000 in forfeitures and double the actual damages of $633,000—not including costs of investigation and prosecution—did not result in disproportionate recovery and would do no more than afford the government indemnity for its injuries. *Id.* The ratio of total recovery to actual damages in *Killough* was less than 2.2 to 1, compared to more than 220 to 1 in this case; the *Killough* court examined the particular facts before it (contrary to the government's position) and found no multiple punishment. It did not reject but followed the analysis below. *Scott* did not involve a double jeopardy question at all, but the quite distinct issue of whether the government was required to prove the elements of a claim under the Civil Monetary Penalties Law beyond a reasonable doubt. 845 F.2d at 856.

criminal prosecution—so that it is barred regardless of the punishment—but that *purpose* cannot affect whether the actual *result* in a given case is to recompense the government or instead impose punishment. Such an inquiry necessarily depends on the facts.

The government's approach is in essence a reincarnation of the "interest analysis" approach to double jeopardy previously rejected by this Court. Because Congress is purportedly pursuing a different interest in providing for civil false claims sanctions, the argument goes, any punishment actually inflicted is not duplicative of punishment already imposed under the criminal false claims statute. This Court has rejected such an analysis in considering dual sovereignty questions, whether urged by the defendant, *Heath* v. *Alabama*, 474 U.S. 82, 91-92 (1985), or the government, *see Abbate* v. *United States*, 359 U.S. 187, 196-197 (1959) (Brennan, J., concurring), and the analysis should gain no foothold here. When a person has been punished twice in separate proceedings for the same offense, it makes no difference whether the legislature was pursuing different interests in imposing the successive punishments. In such a case the question is not legislative intent, but rather whether the defendant has in fact been punished twice.[16]

[16] The question of multiple punishment *is* governed by legislative intent when the issue is what punishments were authorized to be imposed *in a single proceeding*. *See, e.g., Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983) ("Where * * * a legislature specifically authorizes cumulative punishment under two statutes * * * the prosecutor may seek and the trial court or jury may impose punishment under such statutes *in a single trial*") (emphasis supplied); *Ohio* v. *Johnson*, 467 U.S. 493, 500 (1984) (issue governed by legislative intent when multiple charges brought "in a single prosecution"). This Court has never permitted multiple punishment for the same offense in separate proceedings, or suggested that a legislative intent to achieve such a result would be controlling. *Contrast Hess*, 317 U.S. at 554 (Frankfurter, J., concurring) (urging such a rule).

In any event, a focus on the purpose of Congress in imposing the sanctions would be peculiarly indeterminate. As this Court recognized recently, civil penalties, like treble damages and punitive damages, are "intended to punish culpable individuals." *Tull* v. *United States*, 107 S. Ct. 1831, 1838 (1987). Sanctions of the sort at issue here are at once remedial and punitive in purpose, and any effort to find the one, true purpose behind the sanctions would be largely artificial. Just last Term, this Court emphasized that it had "eschewed" an approach that would make the distinction between criminal and civil contempt proceedings "turn simply on what their underlying purposes are perceived to be." *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1431 (1988). The reason—which applies equally as well in the present context—was that "[i]n contempt cases, both civil and criminal relief have aspects that can be seen as remedial or punitive or both * * *." *Id.* The Court therefore looks not to "underlying purposes" but rather to the "character of the relief imposed," *id.* at 1429, as in this case the District Court looked to the penalty imposed to determine whether it was compensatory or punitive.

This mixture of purposes is particularly evident with respect to the statute at issue in this case. The government contends that the sanctions were intended to be remedial rather than punitive, but its brief is highly selective in its citation of the legislative history. To round out the picture, the Court should know that the double damages and forfeiture provisions were originally proposed as part of a bill "to prevent *and punish* frauds upon the Government," Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (emphasis supplied), that these provisions set forth "the mode of proceeding *to punish* persons," and that they were intended to ferret out those defrauding the government and "bring[] rogues to justice." *Id.* at 955-956 (Mr. Howard) (emphasis supplied).[17]

Perhaps recognizing that the penalty in this case cannot be sustained on the basis of any relation to a compensatory purpose, the government argues that it also serves "the additional and wholly legitimate purpose of deterring those who would submit false claims." Gov't Br. at 19. This Court, however, has unambiguously stated that "[r]etribution *and deterrence* are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979) (emphasis supplied). *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963) ("traditional aims of punishment" are "retribution and deterrence"). In *Wolfish*, the Court noted that "[a]bsent a showing of an expressed intent to punish," the question whether a given imposition was punitive would turn on "'whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* at 539 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 169). Here there is not only an expressed intent to punish, but the forfeiture of $130,000 for total losses of no more than $16,000 is clearly "excessive in relation to the alternative purpose" of compensating the government for its losses.

The government regards the "civil penalty" label as all-important, *see* Gov't Br. at 10, 21-23, but its significance diminishes when the history of the statute is examined

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[17] As one of the House sponsors of the 1986 amendments emphasized, "the dual purpose of any such law should always be to deter as well as punish fraudulent conduct." 132 Cong. Rec. H6480 (daily ed. Sept. 9, 1986) (Rep. Fish). *See also Smith* v. *Wade*, 461 U.S. 30, 85 (1983) (citing civil False Claims Act as example of a statute "subject[ing] persons to a punitive damages remedy") (Rehnquist, J., dissenting).

more carefully. The Congress that originally enacted the False Claims Act did not label the forfeiture and double damages "civil penalties," nor were they so labelled in the Revised Statutes.[18] The label appeared only in 1982, with the revision and codification of Title 31 of the United States Code. Pub. L. No. 97-258, 96 Stat. 877, 978-979. Since that codification was intended to have no substantive effect, *see* H.R. Rep. No. 651, 97th Cong., 2d Sess. 3-4 (1982), the appearance of the "civil penalty" label cannot be regarded as probative, let alone determinative of Congress' intent.[19]

This Court in *Hess* decided simply that the forfeiture and double damages provisions were not *inherently* criminal, and that they did not result in multiple punishment on the particular facts of that case.[20] In light of the mixed

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[18] *See* Act of March 2, 1863, ch. 67, 12 Stat. 696; Rev. Stat. §§ 3490, 5438, *quoted in United States* v. *Bornstein*, 423 U.S. 303, 305-306 n.1 (1976).

[19] *See also Hicks* v. *Feiock*, 108 S. Ct. at 1429 ("the labels affixed either to the proceeding or to the relief imposed * * * are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"); *Trop* v. *Dulles*, 356 U.S. 86, 94 (1958) ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!") (plurality).

[20] Even after *Hess* determined that the statute on its face was not inherently criminal, courts have noted its penal aspects. *See, e.g., United States* v. *Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) ("The False Claims Act is quasi-penal"); *United States* v. *Schmidt*, 204 F. Supp. 540, 543 (E.D. Wis. 1962). *See also United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (False Claims Act "is not only penal, but drastically penal"). *Bausch & Lomb* was affirmed by an equally divided Court *after* the decision in *Hess*. 320 U.S. 711 (1943). The result in *Hess* has not been without its critics. *See, e.g., United States* v. *Gable*, 217 F. Supp. 82, 83 (D. Conn. 1963) (expressing view that forfeiture provisions are "penal in nature" and noting that "this Court is not so sure that the presently constituted Supreme Court would reach the same result as was reached in [*Hess*] two decades ago").

remedial and punitive purposes underlying the "civil" sanctions, it should come as no surprise that the application of those sanctions may result in punishment in particular cases.

The government's analysis is also flawed in that it recognizes no limit to the penalty Congress could impose in pursuit of a supposed remedial purpose. Although the government points to the 1986 amendments to the False Claims Act as fortifying its position, those amendments actually highlight the inherent difficulty in a theory that looks only to the purpose of Congress and eschews any inquiry into the facts of particular cases. The amendments provide for triple rather than double damages, and a $5,000 to $10,000 penalty rather than the $2,000 penalty in the old act. Here, that would mean Halper would have to pay *at least* $326,755 on his $585 in false claims, yet the government's theory would still find this disproportion wholly irrelevant to the question whether the sanction was remedial or punitive. Nor is there anything in the government's analysis that would draw a line at quadruple or ten times damages, or penalties of $100,000 or even $1 million. Indeed, as the government sees it, such increases would make a double jeopardy claim *harder* to prove, because they would show Congress' clear intent that such amounts were needed to provide an adequate weapon against fraud. *See* Gov't Br. at 25.

Under the government's approach, 200 false claims of $1 each *must* result, under the current act, in a "civil" penalty of $1 million on top of any criminal sanctions

already imposed. According to the government, *Hess* decided—once and for all, and regardless of the facts of any particular case—that such a penalty was remedial and not punitive, that since the penalty was *intended* to recompense the government for its losses, there need be no inquiry into the facts to see if it actually did so or instead served another purpose.

This is not the approach set forth in *Hess*. This Court has permitted civil sanctions after criminal punishment when those sanctions in fact are remedial and simply "make sure that the government would be made completely whole." *Hess*, 317 U.S. at 551-552. This rationale carries with it an inherent limitation on the second sanction that may be imposed. When a court *can* say that the recovery "will do more than afford the government complete indemnity for the injuries done it," *id.* at 549, the rationale no longer applies, and the penalty is a second punishment in violation of the double jeopardy clause.[21]

[21] The court applied such an analysis to the essentially identical state counterpart of the False Claims Act in *In re Garay*, 89 N.J. 104, 444 A.2d 1107 (1982). After concluding that the civil penalty provision was not criminal on its face, the court recognized that "any penalty assessed under these provisions must be tested for reasonableness as applied to the specific facts involved." *Id.* at 1112-13. The court noted that "[a]utomatic application of the maximum penalty when a person committed a large number of frauds involving small dollar amounts could be unreasonable," and concluded that on the facts before it "[t]he difference between the amount of money taken and the penalty sought [$116,000 in penalties for a $1,290.20 loss] is so great that it may far exceed the state's interest in compensation and therefore be unreasonable." *Id.* at 1113 (footnote omitted). The court ruled that the amount of the penalties was not mandatory and remanded the case so that state officials could exercise discretion in imposing a lesser amount. *Id.*

To be sure, the loss to the government must be broadly conceived, and include not only actual damages but the costs of investigating and prosecuting the action as well. The government criticizes the District Court for "dwelling on the government's 'actual damage,'" Gov't Br. at 19, but the criticism is inaccurate and unfair. The District Court specifically found as fact that $16,000 would "reasonably compensate the Government for actual damages *as well as expenses incurred in investigating and prosecuting this action.*" J.S. App. 10a (emphasis supplied). The government was free to adduce evidence of greater expenses, but, as the District Court specifically noted, it did not do so. J.S. App. 11a. Nor did the government ever challenge the trial court's factual finding, which can only be set aside if "clearly erroneous." Fed. R. Civ. P. 52(a).

In the District Court, the government recognized that "[t]he purpose of the civil penalty is to ensure that the Government will be fully compensated for any damages it has incurred."[22] On this record, the government sought to be compensated 220 times over its actual damages and more than eight times over the total of its damages and the cost of investigation and prosecution. That is not making the government whole; it is punishing Halper, who was already punished in the prior criminal proceeding.

The government also misses the point in arguing that a $2,000 penalty would be reasonable for a single $9 overcharge, and that therefore a $130,000 penalty must be reasonable for 65 $9 overcharges. Gov't Br. at 16-17. The question, under *Hess*, is the relationship between the sanction imposed and the government's loss, including

[22] R. 27: Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (Jan. 8, 1987), at 5.

costs of investigation and prosecution. The government's syllogism would only hold true if bringing the case for 65 $9 overcharges cost the government 65 times the cost of the case for one $9 overcharge. That probably is never true, and certainly was not true on the facts of this case.

The government resists a case-by-case approach, but that is the only approach that makes sense where double jeopardy is concerned. No statute violates the double jeopardy clause on its face. The question is always whether a particular person in a particular case has been subjected to "multiple punishments or repeated prosecution for the same offense." *United States* v. *Dinitz*, 424 U.S. 600, 606 (1976). Nor will such an approach be at all disruptive. If the facts establish that the recovery sought exceeds any reasonable compensation for the government's loss, the government can consent to less than the full penalty, ensuring that the government receives its full due while also ensuring that the defendant is not punished twice for the same offense.

The government has done precisely that before, apparently without concern for the dire consequences it now predicts. *See* Gov't Br. at 17 n.12. For example, in *United States* v. *Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965), the defendant was convicted of 34 counts of violating the criminal False Claims Act, and the government thereafter brought a civil action to recover a $2,000 penalty on each of the 34 false claims. By the time of judgment, however, the government advised the court that the Department of Justice had "adopted a new policy," and that it now sought only "'as many forfeitures as the court in its discretion deems proper.'" *Id.* at 445 (quoting Government's Post Trial Memorandum of Law). Judge Feinberg imposed a $6,000 penalty rather than the $68,000 the government originally sought, in part because of "the fact

that Greenberg has already been convicted in a criminal prosecution." *Id.* [23]

In *Peterson* v. *Richardson*, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd sub nom. Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975), the defendant was criminally prosecuted, convicted and sentenced, and the government then brought a civil action seeking a $240,000 penalty for 120 false claims totalling $16,153.44. The District Court declined to impose the $2,000 penalty on each of the 120 counts, noting that the purpose of the forfeiture was "to reasonably indemnify the government for all losses arising from the false claims" and "make sure the government would be made completely whole." 370 F. Supp. at 1267 (citing *Hess*). The court concluded that a $240,000 penalty "would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government," imposing instead a $100,000 penalty. 370 F. Supp. at 1267-68. The Fifth Circuit affirmed, noting that "the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government."[24]

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[23] *See also United States* v. *Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979) (government "waived its right to double damages under the Act," seeking only forfeitures).

[24] 508 F.2d at 55. Other courts, while viewing themselves as constrained to impose a $2,000 penalty on each count, have expressed concern about the punitive consequences of such an approach in particular cases. *See, e.g., United States* v. *Diamond*, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987) ("The court is troubled by the possibility that a forfeiture penalty automatically applied to each proved count of a criminal Medicare fraud indictment could work an injustice in a particular case").

A similar approach was recently endorsed by this Court in *Morris* v. *Mathews*, 475 U.S. 237 (1986). In that case the defendant was convicted of aggravated murder. After determining that this offense was barred by the double jeopardy clause, the state appellate court reduced the conviction to the non-barred offense of murder, and this Court held that such a modification was consistent with the double jeopardy clause. So too here the District Court determined that, on the facts of this particular case, a penalty of $130,000 was barred by the double jeopardy clause, and reduced the government's recovery so that it would not exceed a remedial amount.

The District Court's original decision—holding that it had discretion to limit the government's recovery under the False Claims Act—was fully in accord with this Court's frequent admonition that federal statutes are to be construed to avoid constitutional difficulties, "unless such construction is plainly contrary to the intent of Congress."[25] The government cites no legislative history indicating that the Congress that passed the False Claims Act intended to insist on a mandatory $2,000 per count forfeiture, even if such a penalty raised serious constitutional concerns.[26] If such a saving construction is not possible, the court has no choice but to deny recovery of the excessive amounts, and the government has the choice of accepting recovery of less than the full statutory penalty.

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[25] *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988). *See, e.g., United States* v. *Clark*, 445 U.S. 23, 27 (1980); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979).

[26] The government relies upon the statements of a different Congress more than a century later, Gov't Br. at 17 n.12, but recognizes that this is weak evidence of legislative intent. *See id.* at 26.

Nor is there anything about the holding below that would portend the procedural difficulties noted by the government. The government argues that it would not know in advance whether it had to prove its case beyond a reasonable doubt, or whether civil or criminal discovery rules applied. Gov't Br. at 27-28. Such concerns reflect the government's basic misconception that the issue is whether the proceeding is inherently civil or criminal. The question is rather one of multiple punishment, and the double jeopardy clause is only triggered if the government insists on recovery in a second proceeding—after punishment has already been imposed—of an amount that exceeds reasonable compensation for its losses. The proceeding can be conducted as any other civil proceeding so long as the government does not attempt to recover an excessive sum; if it intends on doing so, the procedure employed will make no difference, since multiple punishment can no more be imposed in two successive criminal proceedings than in a criminal proceeding followed by a civil proceeding resulting in punitive sanctions.[27]

Finally, the government devotes much of its brief to detailing the problem of false claims in government contracting, and stressing the need for effective tools to combat such fraud. *See* Gov't Br. at 3-4, 9, 20. The decision below will not limit the effectiveness of the criminal and civil provisions of the False Claims Act. Under the approach of the District Court, the government can pros-

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[27] The fact that the protection of the double jeopardy clause against multiple punishment is implicated does not mean that other criminal protections are as well. *See Breed* v. *Jones*, 421 U.S. at 528 n.10 ("Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause").

ecute and punish those guilty of filing false claims under the criminal provisions, obtaining on each count a sentence of up to five years in prison and a fine of up to $250,000 in the case of an individual, $500,000 in the case of an organization, and $1 million in the case of a defense contractor. *See supra* note 1. The government can then, as it did here, invoke the collateral estoppel effect of the conviction in a subsequent civil proceeding—in which the defendant has no defenses, *see* J.S. App. 9a—and automatically recover the full amount of *all* the losses it has sustained, including the costs of investigation and prosecution. All the decision below means is that the government cannot recover far beyond its damages and expenses in the second proceeding.

The government retains a broad range of other options as well. Although the Court need not pass in this case on the validity of these different scenarios, there is nothing in the rationale of the decision below that would preclude the government from seeking criminal and civil sanctions in the same proceeding, and obtaining the full range of statutorily authorized criminal and civil penalties. *See* Gov't Br. at 28 & n.18. In such a case the question of multiple punishment would be limited to ensuring that the total punishment imposed did not exceed that authorized by the legislature. Such a rule does not apply when, as here, the punishments are imposed in separate proceedings. *See supra* note 16.

Nor is there anything in the decision below that would preclude a civil action alone, with recovery of the full range of statutory penalties. We know from *Helvering* and *Hess* that such a proceeding is not inherently criminal, and even if it results in a particular case in what may be viewed as punishment, there is of course no question of *multiple* punishment—the key to the holding below.

Finally, there is nothing in the decision below that would bar a civil action after a criminal acquittal. The civil action is not inherently criminal, so the defendant is not put in jeopardy a second time, *Helvering*, *supra*, and since the defendant has not been punished, there can be no issue of multiple punishment.

In sum, nothing in the decision below interferes with the effective enforcement of both the criminal and civil provisions of the False Claims Act. The government remains free to structure its prosecutorial efforts to seek the maximum recovery authorized by Congress under both the criminal and civil false claims provisions. It need only do so in a manner consistent with the double jeopardy clause.

Even if the decision below did limit the effectiveness of the government's efforts, that is not an argument for reversal. No amount of urgency surrounding the problem of false claims and fraud in government programs could justify dispensing with the constitutional protection against the imposition of multiple punishments in separate proceedings. "[T]he fact that a given law or procedure is efficient, convenient, and useful *** will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 944 (1983).

* * * *

Mr. Halper was indicted, convicted, and punished for filing $585 in false claims over a two-year period. When his sentence of two years in prison and a $5,000 fine was imposed and the proceeding ended, Halper was entitled to rely upon the fact that he could not be punished again for those same false claims. He could still be made to compensate the government for its losses—and even for the costs incurred by the government in recovering its

losses—but he could not be punished again. On the undisputed facts of this case, the government sought to punish Halper a second time. A penalty of $130,000 for $585 in actual damages and no more than $16,000 in actual damages and costs of investigation and prosecution cannot be viewed as recompense. The court below correctly held that the double jeopardy clause barred the government's effort, and the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, and those in the District Court's opinions, the judgment should be affirmed.

Respectfully submitted,

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